

1 UNITED STATES DISTRICT COURT  
2 MIDDLE DISTRICT OF GEORGIA  
3 ALBANY DIVISION

4 CASE NO. 1:07-CR-18(WLS)

5  
6 UNITED STATES OF AMERICA

7 Plaintiff,

8 Vs.

9 FRANK RUSSELL MCCOY

10 Defendant.

11  
12 MOTION HEARING

13 BEFORE THE HONORABLE W. LOUIS SANDS  
14 UNITED STATES DISTRICT COURT JUDGE

15  
16 DATE: JANUARY 7, 2010

17 LOCATION: ALBANY, GEORGIA

18 COURT REPORTER: R. DARLENE PINO

19  
20 APPEARANCES:

21 FOR THE PLAINTIFF: JAMES N. CRANE  
22 CHANTEL L. FEBUS

23 FOR THE DEFENDANT: CYNTHIA W. ROSEBERRY

1 (Defendant not present)

2 THE COURT: All right. Good morning.

3 COUNSEL COLLECTIVELY: Good morning.

4 THE COURT: Thank you for your patience. We had  
5 a little bit of mix-up about the calendar this morning,  
6 but we're all here.

7 The Court sat down for a hearing in the case of  
8 United States versus Frank Russell McCoy in case number  
9 1:07-CR-18(WLS). There was a motion by the government to  
10 permit 404(b) evidence, and I think because we may have  
11 gotten off track a little bit in the scheduling of  
12 responses and all and we've got that back in line, the  
13 defense filed its ultimate response. I think the  
14 government has since filed a reply, and I thought we  
15 should probably discuss this in the form of a hearing to  
16 see -- so we could get this resolved so everyone would  
17 know where we stand with regard to that motion.

18 I think maybe just a brief summary from the  
19 government and any other, further argument from the  
20 defendant is all I need to hear really. All right.

21 MS. FEBUS: Morning, Your Honor.

22 THE COURT: Good morning.

23 MS. FEBUS: Just in brief summary, it's the  
24 government's position that the child pornography evidence  
25 that was found on the defendant's computer may be

1 admissible if the defendant -- the defense through its  
2 witnesses, or the defendant taking the stand himself,  
3 opens the door to that issue.

4 THE COURT: I think the only question I had  
5 about opening the door, I know that's a theory that's been  
6 with us a long time, you know. That usually falls with  
7 regard to a defendant taking a very broad statement of  
8 innocence and lack of any responsibility, and that  
9 generally means that you can ask about anything.

10 Does the government have any suggestion as to what it  
11 thinks is an open-door sort of statement?

12 MS. FEBUS: Yes. I think that probably the most  
13 obvious one, the one that's most likely to come up, is if  
14 the defendant himself or the defense expert takes the  
15 stand and argues probably one of two things or both. If  
16 it is argued that the defendant's stories, the ones that  
17 were found on his computer and uploaded to the Internet,  
18 are not prurient, that they're not directed to a morbid  
19 sexual interest, or if someone gets on the stand for the  
20 defendant and testifies regarding his intent with respect  
21 to the uploading of those images to the Internet, I think  
22 in that case, that type of testimony is allowed, some of  
23 which would not be legally relevant, so we would object,  
24 but if it's allowed, I think the government should be able  
25 to introduce the 404(b) evidence because these stories are

1 found on the computer and then also all of these, you  
2 know, 10,000 images including a streaming screensaver were  
3 also found on the computer. To really understand the  
4 context of a story, the background to why the defendant  
5 wrote them, the government thinks that it would be  
6 appropriate to introduce those images.

7 So that's one way that it could come in, and the  
8 government's argument there would be that the introduction  
9 of the images would be inextricably intertwined with the  
10 defendant's stories in large part because the stories,  
11 which the defendant has assigned authorship dates,  
12 correspond to some of the images and that the stories  
13 describe some of the images. So to the extent that the  
14 defendant's intent or the sexual nature of the interest --  
15 I'm sorry -- of the stories or whether the stories appeal  
16 to prurient interests become an issue, the government  
17 thinks that it should be able to introduce the child  
18 pornography images in that case.

19 THE COURT: Would it be a fair description of  
20 the government's position to say that the government is  
21 not asserting this as being evidence that should be  
22 introduced in the main --

23 MS. FEBUS: That's absolutely right.

24 THE COURT: -- because, I guess, the nature of  
25 this charge is what I think this Court tried to make clear

1 in the last order, this is an obscenity prosecution  
2 although it may, as a subject matter, relate somehow to  
3 children or matters of that nature is essentially an  
4 obscenity case --

5 MS. FEBUS: Yes.

6 THE COURT: -- and I think there may be even a  
7 more narrowing of the -- of the evidence in the case in  
8 light of -- I think there -- I don't know whether that  
9 will be redone at the trial itself, but I think there's  
10 been some suggestion that there's no denial by the  
11 defendant that those were his writings or that the up-link  
12 was from him, but he has a legal argument that this does  
13 not constitute a violation of the law, either as the law  
14 states it or that it cannot be under the Constitution.

15 MS. FEBUS: I agree with that in part. That  
16 brings up the defendant's stipulation. So the defendant  
17 stipulated that he authored the stories, but as far as the  
18 government knows, the defendant has not stipulated to the  
19 uploading of the stories to the Internet.

20 THE COURT: That's what I'm saying. I don't  
21 know that I've said that accurately, but essentially this  
22 case is about whether the contents of this, whether or not  
23 there's legal nexus --

24 MS. FEBUS: Yes.

25 THE COURT: -- that he could be -- that he could

1 be criminally accountable for.

2 MS. FEBUS: Exactly. Exactly. Which is why  
3 it's the government's --

4 THE COURT: Right.

5 MS. FEBUS: -- position that we would only try  
6 to introduce this as inextricably intertwined depending on  
7 what the defendant puts on for his defense and arguments.

8 So that's one way we think it could come in.

9 In addition to that, it could come in -- And this is  
10 actually related to what we were just discussing as 404(b)  
11 as other act evidence, again, because the defendant has  
12 only stipulated to authoring the stories and the  
13 authorship of the stories is not the crime. The crime is  
14 causing -- using and causing to be used interactive  
15 computer service as the transport obscene material. So  
16 that the defendant wrote the stories is something that we  
17 are going to introduce and prove because it's inextricably  
18 intertwined with this uploading the stories, but in order  
19 to make the 404(b) other act evidence issue go away, the  
20 defendant would essentially have to stipulate to uploading  
21 the stories to the Internet, and the defendant hasn't done  
22 that.

23 And so that may become an issue. And if that's the  
24 case, then there are several things that the government  
25 would want to introduce with respect to the child

1 pornography images. This is also what we would seek to  
2 introduce if the defendant proposes some type of alibi  
3 defense. Normally in child exploitation cases when we're  
4 dealing with computers one of the things that we have to  
5 prove is that it's the defendant who did the uploading and  
6 the defendant who did the criminal activity. One of the  
7 ways that we do that is by looking at other instances of  
8 activity on the computer, whether it's accessing a bank  
9 account or sending an e-mail, other activity that  
10 identifies the defendant as a user of the computer and as  
11 the person who used the computer close in time to the  
12 criminal activity. And, again, some of the facts that I  
13 just stated with regards to the downloading of the CP  
14 images and those file creation dates and the dates that  
15 the defendant himself assigned to stories on his Web site,  
16 some of that information or that evidence, rather, might  
17 become relevant to prove the identity of the defendant as  
18 the person who committed the criminal acts that are at  
19 issue.

20 And so that would be our argument under 404(b).

21 THE COURT: How would that identify him as the  
22 person?

23 MS. FEBUS: Because it's the way that we prove  
24 who used the computer, when the computer was used, and  
25 what the computer was used for. And so if there is -- So,

1 for instance, if the defendant argues I didn't upload  
2 those stories, my son did, then one of the things that we  
3 would try to prove is that -- an upload date, you know,  
4 just a date, random date, January 1st, 2007, was close in  
5 time to when the defendant was engaged in other  
6 activities. And we --

7 THE COURT: Yes, but that -- would you know --  
8 how would you know whose activity that was? I mean, I'm  
9 not trying to get ahead in the case, but I mean --

10 MS. FEBUS: That's how we prove it up. We try  
11 to show, you know, the defendant accessed the bank  
12 account, you know, at 3 p.m. that day, and then there was  
13 an upload, you know, two hours later.

14 THE COURT: By showing something --

15 MS. FEBUS: And the inference that's drawn from  
16 the closeness of that activity.

17 THE COURT: That still is something that you  
18 think is identifiable with the defendant?

19 MS. FEBUS: Yes. Yes.

20 So that, again, depending on what the defendant  
21 proffers and his defense might be another issue.

22 Then the third way that we think that this evidence  
23 might come in is if the defendant himself takes the stand.  
24 And if the defendant takes the stand, the government would  
25 be able under Rule 608 and Rule 613 to question the

1 defendant about his suitability or character for  
2 truthfulness as a witness and also to get into questions  
3 of prior inconsistent statements. And that all relates  
4 back to the conversation that the defendant had with a  
5 Minnesota Sheriff's Deputy Charles Ankney, who we plan to  
6 have come in and testify. And during that conversation  
7 the defendant offered up information regarding whether he  
8 had child pornography in his possession in his home, and  
9 he answered that question or his response to the Deputy  
10 was that he did not possess child pornography. It's the  
11 government's position if the defendant takes the stand,  
12 the government should be able to question him about his  
13 trustworthiness in that regard and then question him to  
14 see if he's going to make an inconsistent statement, one  
15 inconsistent to his prior statement to Deputy Ankney.

16 THE COURT: I mean, I lost you there on that  
17 one, frankly speaking.

18 MS. FEBUS: Okay.

19 THE COURT: I mean, his character for  
20 truthfulness, that's usually reputation or based on some  
21 prior finding of untruthfulness as opposed to what the  
22 truthfulness was within the context of a given case.  
23 That's where I where I kind of lost you.

24 MS. FEBUS: We think that this -- And we agree,  
25 but we think this would be in the context of the given

1 case because the incident between Deputy Ankney and Mr.  
2 McCoy occurred in this general investigation where Deputy  
3 Ankney responded to a civil stand-by call from Mr. McCoy's  
4 wife, and she was reporting the defendant's stories. She  
5 called the police because she wanted to alert them to what  
6 she considered to be improper or criminal activity with  
7 respect to the stories.

8 THE COURT: So are you saying then there's a --  
9 the suggestion is that he was asked a specific question,  
10 he gave an answer, and that later, in the government's  
11 position, proved to be untrue?

12 MS. FEBUS: Yes. Exactly.

13 THE COURT: All right.

14 MS. FEBUS: And so those would be the way,  
15 again, if the defendant opens the door that the government  
16 thinks that we would be able to introduce that evidence.

17 THE COURT: All right.

18 MS. FEBUS: Thank you.

19 THE COURT: Thank you. Ms. Roseberry.

20 MS. ROSEBERRY: Good morning, Your Honor.

21 THE COURT: Good morning.

22 MS. ROSEBERRY: I guess first I would say that  
23 we generally don't disagree with the proposition that if  
24 there were some prior inconsistent statement that the  
25 government should have an opportunity to test that prior

1 inconsistent statement. I'm not so sure that having items  
2 that were not seized as a result of that statement -- In  
3 other words, this conversation with this Deputy Ankney did  
4 not result in any seizure at that time of anything, and  
5 wasn't at that moment a part of this investigation. I  
6 think it later became a part of the investigation. But we  
7 would concede that if anyone takes the stand, you can  
8 certainly test any prior inconsistent statement under 608  
9 and 613, so I don't think we're quibbling about that.

10 I think the issue that we have is -- I'm a little bit  
11 confused, I have to be frank with you, about the idea that  
12 something can be inextricably intertwined and yet not be  
13 relevant until it's triggered by something else. I'm sure  
14 the government would say that these stories are patently  
15 offensive, it's part of their burden of proof. And with  
16 that, when you think about admitting evidence like this,  
17 the balance goes to 403 or is made pursuant to 403, and we  
18 know from cases that the government cited like King in its  
19 response to our Motion in Limine that if the prosecution  
20 doesn't need it, then it doesn't come in that way. In  
21 other words, the lesser the need for it, the more likely  
22 it is that the Court should exclude it under this idea  
23 that it's just too prejudicial, that the prejudice  
24 outweighs any probative value it has at all, that it would  
25 be, in the words of the case cited by the government, a

1 matter of scant and cumulative probative force and not  
2 something that the Court should deem has enough weight to  
3 outweigh -- substantially outweigh the prejudice that it  
4 would have.

5 So we would offer that it's not inextricably  
6 intertwined because as part of the government's case we  
7 expect for them to say, look at these stories, you can  
8 look at them and see that they're patently offensive, you  
9 can look at them and see that they appeal to prurient  
10 interest. And so in light of King, we would say that they  
11 shouldn't be allowed under any circumstances in a 403 sort  
12 of evaluation and they certainly don't come in, in the  
13 government's case in chief, and I think they've conceded  
14 that that's the issue, that they only come in if the  
15 defendant takes the stand. We believe that some question  
16 about the inconsistency would be the extent to which the  
17 government could test that veracity rather than some  
18 further extrinsic physical evidence with respect to the  
19 veracity of those statements.

20 The idea that -- It sounds like the government is  
21 trying to limit our challenge to its burden of proof of  
22 one of the elements, prurient interest, by saying that if  
23 we attack their ability to prove that element then we've  
24 somehow opened the door to this extrinsic evidence to come  
25 in to show that these stories, which the government will

1 say is patently offensive, appeal to the prurient  
2 interest, and that just seems like sort of a backwards  
3 sort of -- a backdoor kind of argument. It almost seems  
4 like using a crutch to get something in that --

5 THE COURT: I forgot to ask the government this  
6 question because when we're speaking of obscenity or its  
7 prurient interest -- prurient interest only in that  
8 material, we're talking about the material that's before  
9 the Court --

10 MS. ROSEBERRY: That's exactly right, Your  
11 Honor.

12 THE COURT: -- not -- not -- You're really not  
13 talking about the defendant's view of it.

14 MS. ROSEBERRY: That's right. That's right.  
15 You're talking about --

16 THE COURT: But whether he perceives it as  
17 prurient or not, there are probably things that some  
18 people would never see prurient no matter how shocking it  
19 was and there are others that would see the slightest  
20 thing --

21 MS. ROSEBERRY: That's right.

22 THE COURT: -- as shocking, and that's where the  
23 community standards, I guess, come in. But I'll give  
24 counsel an opportunity to respond on that, but that was a  
25 question I had intended to ask about.

1 MS. ROSEBERRY: As a matter of law -- as matter  
2 of fact, Your Honor, I believe that the case law would say  
3 that his intent wouldn't matter in this case. Even if he  
4 had the best of intentions, it wouldn't matter. So to try  
5 to use these photos to prove his intent would be a legal  
6 misnomer, it's not something that's a part of the  
7 government's burden of proof as we see it. I think the  
8 case law is pretty clear that as long as he knew that it  
9 was sexual in nature, that that's the general intent that  
10 the government would have to prove.

11 THE COURT: The one question I have though that  
12 counsel mentioned by being inextricably intertwined was if  
13 there's an issue as to who authored and who placed these  
14 things at any place where it was placed, if it was, is not  
15 a matter that could be directly proved say by an admission  
16 or otherwise, then the fact of these other matters might  
17 in some way be relevant to proving that. In other words,  
18 if you're proving what's going on on the Internet from  
19 this particular source, you know, then what other things  
20 may have been done that otherwise may be irrelevant might  
21 be relevant for that purpose.

22 MS. ROSEBERRY: Well, Your Honor, I guess I  
23 would first say I'm not sure that's going to be an issue  
24 at trial, although I wouldn't want to misstate our  
25 position here based on what happens during the

1 government's case in chief. But I would put that there --  
2 if the government were so inclined that it could have  
3 found some less opprobrious evidence, for example, some  
4 bank account as the government mentioned or something like  
5 that, if it is relevant, to show perhaps that Mr. McCoy  
6 was somehow associated with that computer at a particular  
7 time, but even at that -- I mean, you can show that  
8 someone with that computer name was signed on at a  
9 particular time, but you cannot show that -- who was the  
10 person who was using that particular computer name at that  
11 time, and the best example is that Agent McCoy posed as --  
12 pardon me -- Agent Brant posed as someone else as he was  
13 behind the computer sending these requests out. I mean,  
14 we just don't know who's behind there.

15 So perhaps, tangentially, it would be relevant, you  
16 know, there could be some inferences drawn. But the  
17 government surely could have found something that wasn't  
18 as prejudicial to do that with in that it seized his  
19 entire computer.

20 THE COURT: Okay. All right. The government is  
21 the movant, and also that question I asked that I did not  
22 ask while you were there, I'll give you some opportunity  
23 to maybe comment on that, too.

24 MS. FEBUS: The government agrees with the  
25 Court's statement of the law with respect to the obscenity

1 charge, and that is, that the finding has to be an average  
2 person applying contemporary community standards to find  
3 the material to be --

4 COURT REPORTER: Could you speak just a little  
5 slower, please?

6 MS. FEBUS: I'm sorry.

7 That the finding would have to be that an average  
8 person applying contemporary community standards would  
9 find that the material taken as a whole appealed to the  
10 prurient interest, and we completely agree with that.

11 But as part of the 1462 violation, one of the things,  
12 as defense counsel mentioned, that we have to prove up is  
13 that the defendant knew at the time of transportation that  
14 the materials were sexually oriented, and it is the  
15 government's position that having to prove up the sexual  
16 orientation and having to prove up the prurient interest  
17 with respect to the average person of the community might  
18 legitimately bring into evidence other items that were on  
19 the computer that might be indicative of the context of  
20 the stories themselves again because there are stories  
21 that describe -- in the government's view that describe  
22 images that were also found on the computer. But one of  
23 the things that I believe that I mentioned earlier and  
24 I'll mention again is that, you know, the government would  
25 prefer that the Court reserve its ruling on all of this

1 because none of this can be fleshed out --

2 THE COURT: Yeah, I think you're exactly right  
3 --

4 MS. FEBUS: -- until we have testimony. So, you  
5 know, it's great to, you know, get all of this out in the  
6 open so that we know what our relative positions are, but  
7 we can only, you know, posture or say what we think is  
8 going to --

9 THE COURT: You anticipated the Court's ruling,  
10 and that's not unusual about this case, I mean, because  
11 I've found in my experience that it is very difficult to  
12 correctly call a 404(b) issue outside of the specific  
13 context that it's presented. It's so fact specific and  
14 circumstance specific, so I seldom, unless it's something  
15 that's clearly admissible or clearly not, so make those  
16 rulings, but most fall within that context. So what I  
17 would do is I will reserve a ruling on it, but with this  
18 proviso that that particular will not be presented to the  
19 Court as a part of the evidence without notice of the  
20 Court at the time. In other words, if you reach that  
21 point in the case that you felt like, Judge, this is where  
22 we think this evidence can now be introduced, that's where  
23 we'll stop it and take up that issue at that time and then  
24 we'll -- the context should have been fully in place by  
25 that time and the Court will be able to rule.

1 MS. ROSEBERRY: Your Honor --

2 THE COURT: Ms. Roseberry.

3 MS. ROSEBERRY: -- may I inquire of the Court?  
4 Are you speaking with respect to the government's case in  
5 chief or --

6 THE COURT: The 404(b). The government has  
7 already indicated that it was not intending to raise that  
8 in its case in chief. It would be in rebuttal or some  
9 other ways.

10 MS. ROSEBERRY: Okay.

11 THE COURT: But in any case so that we -- so  
12 there's no unintentional or putting it up. I think also  
13 it's a lot easier because there's no jury here. So that  
14 idea of the jury hearing it so I don't worry about it, but  
15 that it not be actually gone into without notice to the  
16 Court from the government, Your Honor, we believe this is  
17 the point in time that we can now submit or elicit the  
18 evidence that's subject to the motion. Of course, at that  
19 time, the defense will have an opportunity to make any  
20 statement that it wished with regard to whether it  
21 believed that -- anything is different than what we now  
22 know.

23 All right.

24 MS. ROSEBERRY: Thank you, Your Honor.

25 THE COURT: Now, were there any other motions

1 that we had? I think pretty much everything else I think  
2 the Court has issued something.

3 MS. ROSEBERRY: I believe we do have a couple of  
4 other matters though --

5 THE COURT: Okay.

6 MS. ROSEBERRY: -- to address.

7 THE COURT: Let me hear those.

8 MS. ROSEBERRY: Your Honor, I was wondering --  
9 I've spoken with the government about this. I understand  
10 that our bench memoranda are due today, and this hearing  
11 will take four hours and travel time alone out of my  
12 ability to work on that. I was wondering if you would  
13 allow us until tomorrow.

14 THE COURT: Yeah. That will be fine.

15 MS. ROSEBERRY: Okay.

16 THE COURT: That will be fine. I just think  
17 that's helpful for the Court so that we are focused and  
18 not -- it will help me listen better.

19 MS. ROSEBERRY: Yes, sir. We're absolutely  
20 willing to do that. I think the government has one  
21 matter.

22 THE COURT: Mr. Crane.

23 MS. ROSEBERRY: Oh, let me just say this. Thank  
24 you, Mr. Crane. Your Honor, it's my understanding that  
25 you issued an order, and we're grateful for that order,

1 for subsistence in housing for our client.

2 THE COURT: Yes.

3 MS. ROSEBERRY: As I stand here, I don't believe  
4 travel arrangements have been made. We have followed up  
5 with the Marshals to try to get that done, and I'm  
6 concerned now about the weather coming from Minnesota at  
7 this point. I don't know if they're going to try to put  
8 him on a bus or put him on an airplane. I suspect that if  
9 he is put on a bus, it will take about 24 hours. He's  
10 60-something years old. I think it will take him about 24  
11 hours to get here if the weather is not inclement, and we  
12 know there's inclement weather coming. And, of course, we  
13 need to be able to spend some time with him prior to  
14 trial.

15 And I just bring this up because --

16 THE COURT: That's why the Court directed that  
17 that be by Friday because I knew that that was the case.

18 Ms. King, after court, would you check with our local  
19 Marshal and see what they can find out about what's going  
20 on with those arrangements.

21 We do have some flexibility since it's a bench trial,  
22 and the only other case that would need a trial is for the  
23 following week, so if I need to push it back a little bit  
24 --

25 MS. ROSEBERRY: Yes, sir.

1 THE COURT: -- I could. And we'll know that  
2 after we hear from them to see what they're -- so they may  
3 be flying him out. Because even that, who knows.

4 MS. ROSEBERRY: And then I imagine that he's --  
5 we'll try to house him here in Albany, which would mean  
6 our, you know, shifting down here a few days early,  
7 perhaps over the weekend I guess.

8 THE COURT: I issued an amended order --

9 MS. ROSEBERRY: Yes, sir. Thank you for that.

10 THE COURT: -- yesterday because we found that  
11 there's some dark places in law yet in terms of trying to  
12 figure out just how to do these things. But I think we  
13 got it figured out. But I think there may be some  
14 practical problem that you raise --

15 MS. ROSEBERRY: Yes, sir.

16 THE COURT: -- that may have a greater effect,  
17 but we do have the ability to shift back, we can push  
18 back, you know, a day or two if we have to.

19 MS. ROSEBERRY: Thank you, Your Honor.

20 THE COURT: Do you all still think this case is  
21 going to take two or three days?

22 MS. ROSEBERRY: Yes, sir.

23 THE COURT: Okay. Remember it's a bench trial,  
24 so we shouldn't have to, you know --

25 MS. ROSEBERRY: With a --

1 THE COURT: The questions are going to be a lot  
2 tighter.

3 MS. ROSEBERRY: I'll just say I have a caveat  
4 because I have a need for nervous bathroom breaks  
5 frequently, so that may delay it a little bit.

6 THE COURT: Well, we have a kind of standing  
7 rule that, you know, if anybody really has to have a  
8 recess, we'll take one.

9 MS. ROSEBERRY: Thank you.

10 THE COURT: I intend to also keep the usual kind  
11 of tight -- the morning schedule because I think it still  
12 gives the Court the ability to keep up with other matters  
13 that we don't want to get behind in, so I was thinking the  
14 8 to 2. We may push it back a little bit, like 8:30 or  
15 something like that and go until 2:30 or something like  
16 that. But the Court intends to keep that schedule.

17 MR. CRANE: If I can just address the Court on  
18 one issue briefly. Your Honor, we have filed two  
19 affidavits from custodians of records from two Internet  
20 providers. One is called Earthlink, one was originally  
21 called Everyone's Internet, but is now owned by a parent  
22 company called The Planet. These are custodians of  
23 records. The underlying documents were provided in  
24 discovery a long time ago, well over a year ago. The  
25 custodian will simply repeat the standard business record

1 foundation questions, that these are records that were  
2 made at or about the time of the underlying transaction,  
3 kept in the ordinary course.

4 And we had filed our notice before Christmas of  
5 intent to rely on affidavit, but with the holidays, it  
6 took us a while. They are now on file. And it allows the  
7 government, then, to release the witness from subpoena.  
8 Thus far the defense has not objected formally, although  
9 Ms. Roseberry has said she would like more time to decide  
10 that issue. If that issue could be resolved, then the  
11 Internet connectivity with a certain address can be  
12 resolved by records, and it's helpful, I believe, to the  
13 government and to the parties, and if that can be resolved  
14 --

15 THE COURT: These are certified documents? Once  
16 they're acknowledged by the custodian --

17 MR. CRANE: Yes.

18 THE COURT: -- would be self-authenticating  
19 unless there's an objection?

20 MR. CRANE: Yes. Unless they're under 90211.  
21 We are, of course, allowed to proceed that way unless  
22 there is a genuine issue as to the authenticity of the  
23 documents raised by the defense that they are somehow  
24 forgeries, not authenticate, not what they purport to be.

25 THE COURT: All right. Ms. Roseberry, can you

1 give us an answer on that or have an idea when you can  
2 because, obviously, if we don't need to fly someone in --

3 MS. ROSEBERRY: Absolutely, Your Honor.

4 THE COURT: -- under this weather, we shouldn't.  
5 And when that, I mean the parties.

6 MS. ROSEBERRY: Let me assure you we have every  
7 desire to try to, you know, not be obstructive in that  
8 way. It's just that I need to be able to have a  
9 meaningful conversation with my client. Of course, the  
10 Sixth Amendment right to confrontation, you know, comes up  
11 in there, and I need to have a meaningful discussion with  
12 him to be able to do that, and I've just not had an  
13 opportunity to do that. I expect to do that.

14 THE COURT: Let me see that.

15 (Discussion off record between counsel)

16 MS. ROSEBERRY: Your Honor, Mr. Crane has  
17 indicated that if we can speak with our client and let him  
18 know tomorrow that that would accommodate them, and I'm  
19 certainly, you know, willing to try to do that and speak  
20 with my client.

21 THE COURT: All right. Because, I guess, you  
22 are in contact with him --

23 MS. ROSEBERRY: Yes.

24 THE COURT: -- though not -- by phone but not --  
25 although it's not face-to-face?

1 MS. ROSEBERRY: That's right, Your Honor. And  
2 he's elderly, so it just -- it takes a little while to  
3 explain things to him.

4 THE COURT: All right.

5 MS. ROSEBERRY: Not elderly, but.

6 THE COURT: Yeah.

7 MS. ROSEBERRY: I have to pull that back.

8 (Laughter)

9 THE COURT: How old did you say he was?

10 MS. ROSEBERRY: I didn't want to step on any  
11 toes.

12 (Laughter)

13 THE COURT: Just how old did you say he was?

14 MS. ROSEBERRY: I think he's 200, Your Honor,  
15 200.

16 THE COURT: If I remember correctly, and I will  
17 remember it the way I remember it, I'm not that old.

18 Okay. Is there anything else?

19 MR. CRANE: Yes. There was one other issue,  
20 and, Your Honor, we'll put this in our bench memo, which  
21 we'll file today, and I've already mentioned it today to  
22 Ms. Roseberry. There's a great number of stories that the  
23 defendant wrote, and it may be as many as 4,000 pages,  
24 although a lot of them are very similar and it becomes  
25 almost mind-numbingly impossible to determine exactly if

1 one is repeating itself. What we proposed is the -- what  
2 we would propose to the Court is the following. There  
3 were 18 stories that were downloaded within the time  
4 period of the indictment initially to Michael O'Keefe's  
5 computer back in -- I don't have the exact date, but  
6 within the time frame of the indictment, and the Court is  
7 generally familiar with these. There are other downloads  
8 that were made by Special Agent Cory Brant on two other  
9 occasions that include 3,000 pages and then one I believe  
10 is about 4500 pages, that cannot be conveniently examined  
11 on a case-by-case basis by, I would submit, any finder of  
12 fact, whether jury or the Court. Therefore, what we  
13 propose is that the 18 stories are a representative sample  
14 of his writings, which the government contends are all  
15 obscene, and would ask for a special verdict as to the 18  
16 but we intend to tender all of them into evidence for  
17 context.

18 And I believe that the defense may object to that,  
19 but that is what we submit is a workable proposal, and  
20 then have a special verdict form as to each of the 18  
21 stories.

22 THE COURT: Well --

23 MS. ROSEBERRY: I don't know if you want me to  
24 address that now or in our bench memo.

25 THE COURT: I think you can just respond to that

1 then. Since it's mentioned in their brief, I'll let you  
2 include that in your response.

3 MS. ROSEBERRY: Yes, sir. We will.

4 THE COURT: Anything else?

5 (No audible response)

6 THE COURT: Okay.

7 MR. CRANE: That's all from the government.

8 THE COURT: All right. Well, thank you all very  
9 much. I'll just do a brief order stating what I just  
10 stated on the record earlier that that will be -- the  
11 Court will reserve ruling and that you all are bound not  
12 to inquire into those matters on the record until such  
13 time as there's been notice and a specific order on the  
14 ruling by the Court allowing it. Okay.

15 If anything else needs to be done with regard to the  
16 witness we discussed after tomorrow, let me know. And  
17 also when we find out something from the Marshals or if  
18 you find out something, Ms. Roseberry, that may affect his  
19 arrival here because I think this weather is supposed to  
20 be coming through today, tonight, and tomorrow, and I  
21 think in the Midwest it's -- because he's in Minnesota,  
22 right?

23 MS. ROSEBERRY: Yes, sir.

24 THE COURT: The only thing is that they are  
25 equipped and more -- feel more at home with that kind of

1 weather than maybe we do, so it may not be as restrictive  
2 as we think it is to them. But if it looks like that  
3 there might be some delay that we need to set this off  
4 from Monday, if you all will let me know or let Ms. King  
5 know, and we can just push it to Tuesday. I'd like to  
6 keep it at Monday if we can, but we do have some  
7 flexibility in the schedule.

8 All right. Thank you all very much. We'll be in  
9 recess -- or adjourned.

10 (Court adjourned)

11

**CERTIFICATE**

12

13 I HEREBY CERTIFY THAT THE FOREGOING IS A TRUE AND ACCURATE  
14 TRANSCRIPT OF THE PROCEEDINGS.

15

16

/s/\_\_\_\_\_  
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NOVEMBER 15, 2013

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